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IN THE

Supreme Court of the United States

October Term, 1959.

No. 700

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Petitioner,

v.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania, Defendant and GEORGE J. JOSEPH, District Attorney, County of Lehigh, Pennsylvania, Substituted Additional Defendant,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1959.

No. ____

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Petitioner,

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, DEFENDANT AND GEORGE J. JOSEPH, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, SUBSTITUTED ADDITIONAL DEFENDANT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari be issued to review the final order of the Court of Appeals for the Third Circuit entered on December 9, 1959, dismissing, for want of jurisdiction, an appeal from the final order of a three-judge District Court, solely as to the issue of wilfully discriminatory enforcement of a state statute.

OPINIONS BELOW.

The opinion of the Court of Appeals, filed on December 23, 1959, but not yet reported, is annexed hereto as Appendix B, *infra*. The majority and dissenting opinions of the three-judge District Court filed on December 1, 1959, but not yet reported, are annexed as Appendix A to the Jurisdictional Statement filed simultaneously herewith in the direct appeal from the three-judge court, and for that reason are not attached to this petition.

The opinion of the Court of Appeals for the Third Circuit on an earlier phase of this case is reported at 266 F. 2d 427 (C. A. 3rd, 1959).

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED.

The judgment of the Court of Appeals for the Third Circuit was entered on December 9, 1959 and is annexed hereto as Appendix C. Jurisdiction of this Court to review a final order of a Court of Appeals dismissing an appeal for want of jurisdiction is invoked under Title 28 U. S. C. Sec. 1254(1). *Cf. United States v. California Eastern Line, Inc.*, 348 U. S. 351 (1955).

QUESTIONS PRESENTED.

I. Is an appeal solely upon the narrow, local issue of discriminatory enforcement of a statute by a local District Attorney, as distinguished from the constitutionality of the statute, to be filed with the Court of Appeals or directly with the Supreme Court of the United States, particularly where the three-judge court has held that there is no substantial federal question as to the constitutionality of the state statutes and the discriminatory enforcement issue is raised as an appendant issue?

II. Should an appeal upon the issue of discriminatory enforcement of a statute by a local District Attorney be filed with the Court of Appeals under 28 U. S. C. § 1291 rather than the Supreme Court of the United States under 28 U. S. C. § 1253, because such issue of discriminatory enforcement is not an issue as to which a three-judge court is required under Section 2281 of 28 U. S. C.?

STATEMENT OF THE CASE.

This petition is limited to a procedural issue, but one which is very important in connection with the appropriate procedure for an appeal from the decision of a properly convened three-judge District Court. Said petition is filed in part to protect petitioner's right of review, in the event it is determined that the District Court correctly decided that the Pennsylvania Sunday statutes involved here do not give rise to a substantial federal question.

Since the larger constitutional questions—the constitutionality of the Pennsylvania Sunday statutes—are dealt with in a Jurisdictional Statement filed simultaneously herewith, the facts set forth herein will be limited to those necessary to the question as to which court a review of the discriminatory enforcement issue should be taken.

Petitioner, Two Guys from Harrison-Allentown, Inc., is located in Whitehall Township, Lehigh County, Pennsylvania, where it operates a retail store employing 300 persons. Its discount, high volume, low cost business requires operations on Sunday.

Petitioner opened its store in Lehigh County at a cost of over $1,000,000 only after it had been told that no one had ever been prosecuted for selling on Sunday in Lehigh County and being assured by the township officials that its operation was permissible (N. T. 91, 96-97).[1] In

1. The N. T. references are to Notes of Testimony taken in the court below.

fact the court below said: "On this point the evidence is clear and we find as a fact that in Lehigh County numerous commercial and recreational activities covered by the general prohibition of the 1939 statute have long been conducted openly on Sunday, and continue, without molestation or direction to desist by the defendant or any public officer." Appendix A to Jurisdictional Statement, p. 13a. But after petitioner had been open for six months, respondent, Paul A. McGinley, District Attorney of Lehigh County, commenced the wholesale arrest of appellant's employees for violations of the Act of April 22, 1794, 18 PURD. STAT. Sec. 4699.4, the basic Pennsylvania Sunday Blue Law, which provides for a $4.00 fine per Sunday. The record shows: (1) these arrests were made for the sole purpose of forcing petitioner to close its store on Sunday, (2) the arrests were directed only against petitioner and its employees, (3) other commercial businesses were permitted to operate on Sunday without any interference from the District Attorney, and (4) the District Attorney was improperly induced by Hess Department store, petitioner's competitor, to take this wilfully discriminatory course against petitioner to force it to close its store.

The local District Attorney, also, to intimidate plaintiff's employees not to work Sundays, threatened to arrest them for criminal conspiracy, the penalty for which is a two-year prison sentence and a $500.00 fine. 18 PURD. STAT. Sec. 4302.

Petitioner thereupon, in November, 1958, brought a bill in equity in the Federal Court for the Eastern District of Pennsylvania pursuant to 28 U. S. C. Secs. 1331 and 1343, 42 U. S. C. Secs. 1981 and 1983 and to 28 U. S. C. Secs. 2281 and 2284. The bill in equity alleged that the Pennsylvania Sunday law—the Act of April 22, 1794—then claimed by the District Attorney to apply to petitioner and its employees was unconstitutional because: (a) it was a law respecting the establishment of religion; (b) a law

which prefers or places at an advantage one religion over others; or (c) it denies equal protection since it was discriminatory; and (d) the respondent, Paul A. McGinley, was applying the law to petitioner in an arbitrary and wilfully discriminatory manner.

Senior District Judge Welsh on November 22, 1958 issued a temporary restraining order and ordered the convening of a three-judge court. Five days later another District Judge attempted to revoke Judge Welsh's order. An appeal was taken to the Court of Appeals and that Court, after argument, held that a District Judge of coordinate jurisdiction had no authority to revoke the order of another District Judge. *Two Guys from Harrison-Allentown, Inc. v. Paul A. McGinley*, 266 F. 2d 427 (C. A. 3rd, 1959). In discussing the future consideration of the issue of discriminatory enforcement on remand the Court of Appeals stated:

> "If the three-judge court, when constituted, should reach the conclusion that no substantial federal question as to the constitutionality of the Blue Laws is raised it may then resolve itself into a court of one judge who may determine whether the Blue Laws have been discriminatorily applied by the defendant. *Gully v. Interstate Natural Gas Co.*, 1934, 292 U. S. 16, 18-19, 54 S. Ct. 565, 78 L. Ed. 1088; *Andrew G. Nelson, Inc. v. Jessup*, D. C. S. D. Ind. 1955, 134 F. Supp. 218, 221; *Farmers' Gin Co. v. Hughes*, D. C. W. D. Okla. 1943, 54 F. Supp. 43, 46-47." (at p. 432)

As stated above, the case was remanded to the District Court for trial by three judges. Before trial, but long after the filing of the complaint, the Pennsylvania Legislature passed an amendatory act—the Act of August 10, 1959—which singled out for more severe penalty certain retail sales of particular merchandise sold by petitioner.

The bill in equity was amended to include an attack on the constitutionality of this Act on the same grounds.

At the trial on the merits petitioner introduced evidence from which a court could find that respondent, Paul A. McGinley, had prosecuted only petitioner's employees, that other businesses similarly situated were permitted to operate on Sunday without being molested, and that the sole reason for the discriminatory treatment was that respondent, Paul A. McGinley, was being improperly induced to seek to close petitioner's store by petitioner's principal business competitor, the Hess Department Store of Allentown, Pennsylvania. Petitioner contended that such proof would make the state official's actions unconstitutional. *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

Despite petitioner's Requests for findings of fact and conclusions of law on the discriminatory enforcement issue part of petitioner's case, the court below never passed upon the issue of discriminatory enforcement.

After first determining by a two to one vote that the issue tendered by constitutionality of the statute did not raise a "substantial federal question" because any decision on the constitutionality of Sunday Blue Laws was foreclosed by this Court's action in *Friedman v. New York*, 341 U. S. 907 (1951) wherein this Court dismissed an appeal with respect to a New York Sunday statute for "want of a substantial federal question," it proceeded to a consideration of the discriminatory enforcement issue. It first conceded and found as a fact that there had been no enforcement of the law by the District Attorney or anyone else prior to respondent's actions against the petitioner. Appendix A, Jurisdictional Statement, p. 13a. But it held that it would not make "an anticipatory finding" with respect to the future because the term of Paul A. McGinley as District Attorney would expire, according to the court below, on December 31, 1959. But it did admit that on the present record even after respondent's term would end

"we have the threat of the enforcement of the 1959 act against retail selling while many other kinds of worldly activity proscribed by the 1939 laws have continued and are likely to continue without any interference by the public authorities." Appendix A, Jurisdictional Statement, p. 14a.

It disposed of the constitutional problem presented, however, by the novel theory that any discrimination that could be carried out by the Legislature through a statute would be equally valid if carried out by the individual law enforcement officer by applying the statute against only certain businesses regardless of the motive for the discrimination on the part of the official. Appendix A, Jurisdictional Statement, p. 14a.

Petitioner filed a petition for reargument which, *inter alia*, requested the three-judge court to refer to the original hearing judge (who was also the dissenting judge) the issue of the discriminatory enforcement, particularly since the three-judge court had decided that the constitutional argument based upon the statutes did not raise a substantial question. This petition for rehearing was denied on December 7, 1959.

The petitioner immediately filed a notice of appeal with the Court of Appeals for the Third Circuit. The notice of appeal sought a review of only that part of the final judgment which dealt with the issue of discriminatory enforcement by respondent, Paul A. McGinley. Petitioner simultaneously stated it would seek direct review in this Court of the part of the final order dealing with the constitutionality of the statutes.

In the appeal to the Court of Appeals, petitioner sought to raise the issues:

(1) did the fact that the District Attorney's term ended preclude relief since there were many fines and prosecutions instituted by him still outstanding?

(2) was the District Court correct in its decision, even assuming that the only discrimination which it

would consider was the "threat of the enforcement of the 1959 Act against retail selling while many other kinds of worldly activity proscribed by the 1939 laws have continued and are likely to continue without any interference by the public authorities," and

(3) did the District Court err in failing to make the findings requested with regard to unconstitutionally discriminatory enforcement?

The Court of Appeals two days later, on December 9, 1959, however, without argument on the merits, upon application for a stay order, dismissed the appeal "for want of jurisdiction." Appendix C, *infra*, p. 3a. In its opinion filed on December 23, 1959 it stated that Section 1291 of 28 U. S. C. gave it jurisdiction only where a direct review could not be had in the Supreme Court, and that any final order of a three-judge court, even that dealing with an issue which could have been decided by a single judge, was entitled to direct review in the Supreme Court of the United States. It also stated that petitioner could not split its appeal, taking the constitutionality of the statutes issue directly to this Court and the discriminatory enforcement issue to the Court of Appeals.

After the expiration of the term of office of Paul A. McGinley, an order was entered by the District Court permitting petitioner to join George J. Joseph, the new District Attorney, as an additional defendant. As stated above, even though Paul A. McGinley is no longer in office there are still outstanding many prosecutions and fines resulting from his illegal discriminatory activities during his term in office.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The court below determined that since appeal from a three-judge court is usually to this Court no part of any decision of such a court can be reviewed by the Court of Appeals, even where the complaint is dismissed in its entirety for want of a substantial federal question. But the right of direct review is limited to issues "required by any Act of Congress to be heard and determined by a District Court of three judges." 28 U. S. C. § 1253. Thus it has been repeatedly held that where review is sought of a three-judge court decision which a single judge could have made originally (because the issue was not one of the constitutionality of the statute or the constitutional question was so clear one way), the initial appeal is not to this Court but is to the Court of Appeals. *Public Service Com. v. Brashear Freight Lines, Inc.*, 312 U. S. 621, 625-6 (1941); *Phillips v. U. S.*, 312 U. S. 246, 248 (1941); *Rorick v. Everglades Drainage Dist.*, 307 U. S. 208, 212-13 (1939); *Healy v. Ratta*, 292 U. S. 263, 264 (1934); *Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.*, 292 U. S. 386, 391-2 (1934); *O'Malley v. U. S.*, 128 F. 2d 676, 687 (8th Cir., 1942); *Garmon v. Miami Transit Co.*, 151 Supp. 953 (S. D. Fla., 1957).

Here the issue of discriminatory enforcement always could have been decided by a single judge. *Gully v. Interstate Natural Gas Co.*, 292 U. S. 16, 18-19 (1934). And the Court of Appeals in an earlier stage of this litigation, 266 F. 2d 427, 432-3, had instructed that the issue was to be referred to a single judge if the three-judge court determined that the statutory constitutional issue was not substantial, as the court below did, albeit we submit, erroneously.

The issue of jurisdiction as between this Court and the Court of Appeals is one of fundamental importance. As this Court held in *Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.*, *supra*, at page 391:

> "The three-judge procedure is an extraordinary one, imposing a heavy burden on federal courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended . . . When it becomes apparent that the plaintiff has no case for three judges, though they may have been properly convened, their action is no longer prescribed and direct appeal here must fail as well in this case as where the plaintiff does not press his injunction . . ."

As stated above, the complaint raised two issues, one dealing with the constitutionality of the statutes and the other, assuming the statutes were constitutional, whether there was discriminatory enforcement. The first issue involves a broad question of federal-state relationships, and obviously should be determined by the three-judge court with right of direct review to this Court. But the more narrow and local question of discriminatory enforcement in one county in Pennsylvania is the type of issue which should be considered by a Court of Appeals and not by mandatory review in this Court.

2. The issue here tendered is an important one of procedure under a basic statute governing constitutional litigation in the federal courts. There is no case in this Court or in any other court which precisely deals with the situation here involved. Certainly with respect to such basic questions of procedure and the right of direct appeal there ought to be an authoritative determination by this Court.

CONCLUSION.

For the reasons stated above, the writ of certiorari should be issued and this case should be set for argument immediately following the case on direct appeal submitted in the Jurisdictional Statement filed simultaneously herewith.

Respectfully submitted,

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Dated: February 11, 1960.

APPENDIX A.

(Opinion of Three Judge Court filed December 1, 1959)

(Not Reprinted here since it is printed as Appendix A to the Jurisdictional Statement filed simultaneously herewith.)

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,096

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Appellant

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA.
PENNSYLVANIA RETAILERS' ASSOCIATION, AMICUS CURIAE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Heard on Petition for Temporary Restraining Order or Other Relief, December 9, 1959.

Before GOODRICH and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed December 23, 1959)

PER CURIAM

The plaintiffs in this case have taken the position that they may appeal to the Supreme Court of the United States from an adverse decision by a three-judge court on the issue of the constitutionality of the statute and simultaneously appeal to the Court of Appeals on the issue of discriminatory enforcement of the statute. We think there is no basis for the allowance of a split appeal in this fashion. Therefore, we dismiss the appeal to this Court for want of jurisdiction. See 28 U.S.C.A. §§ 1253, 1291.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,096

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Appellant

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY,
LEHIGH COUNTY, PENNSYLVANIA

ORDER.

Present: GOODRICH and STALEY, *Circuit Judges*

Upon consideration of the appellant's petition in the above entitled case for a temporary restraining order or other relief under 28 U. S. C. Sec. 1651, and after hearing,

It is ORDERED that the relief sought in the petition be and it hereby is denied;

It is FURTHER ORDERED that the appeal be and it hereby is dismissed for want of jurisdiction.

By THE COURT,

GOODRICH,
Circuit Judge.

December 9, 1959